Supreme Court, U.S.
FILED

No. 94-1844 MAY 8 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

THAX XAVIER YOUNG,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, and THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Counsel:

HELENA TETZELI, Esq.
KURZBAN KURZBAN WEINGER AND TETZELI, P.A.
2650 S.W. 27th Avenue
2nd Floor
Miami, Florida 33133
(305) 444-0060

Counsel of Record:

IRA J. KURZBAN, Esq.
KURZBAN KURZBAN WEINGER AND TETZELI, P.A.
2650 S.W. 27th Avenue
2nd Floor
Miami, Florida 33133
(305) 444-0060

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals may implement a *de facto* policy of summarily and uniformly affirming all Board of Immigration Appeals decisions denying relief from deportation to lawful permanent residents who are deportable because of a controlled substance related conviction, but who have established unusual and outstanding equities in support of an application for INA § 212(c) relief from deportation, despite the fact that such policy is contrary to statute, is inconsistent or conflicts with decisions of this Court, and is inconsistent with decisions of other federal courts of appeal.

Whether the Eleventh Circuit Court of Appeals has improperly evaded review of this *de facto* policy by its practice of issuing only *per curiam* affirmed decisions, without any meaningful written opinion or analysis.

PARTIES TO THE PROCEEDINGS

The Petitioner is Thax Xavier Young, a lawful permanent resident of the United States. The Respondents are the United States Immigration and Naturalization Service and the Executive Office for Immigration Review.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF FACTS AND OF THE CASE 3

A. Relief From Deportation Pursuant To § 212(c) 3

B. Facts Of Petitioner's Case 4

1. Residency Of Long Duration In The United States 4

2. Family Ties To The United States And Hardship To Petitioner And United States Citizen Family Members 4

3. Business Ties To The Community ... 5

4. Petitioner's Employment And Hardship To United States Citizens And Lawful Permanent Residents 6

5. Additional Hardship 6

6. Petitioner's Good Moral Character And Rehabilitation 7

TABLE OF CONTENTS – Continued

Page

7. Administrative Proceedings And Appeal To The Eleventh Circuit Court of Appeals 10

ARGUMENT 11

I. The Eleventh Circuit Court Of Appeals' *De Facto* Policy Of Summary Affirmance Of Board Decisions Denying § 212(c) Relief To Individuals With Controlled Substance Convictions Is Contrary To Statute, Is Inconsistent With Decisions Of This Court, And Is Inconsistent With Decisions Of Other Federal Appellate Courts 11

A. The Eleventh Circuit Court Of Appeals' Practice Of Summarily Affirming Board Of Immigration Appeals Denials Of § 212(c) Relief In Cases Involving Controlled Substance Convictions Is Contrary To Federal Law And Congressional Policy 13

B. The Eleventh Circuit Court Of Appeals' Policy Of Uniformly Affirming All Board Decisions Denying § 212(c) Relief To Lawful Permanent Residents With Controlled Substance Convictions Conflicts With Or Is Inconsistent With Decisions Of This Court 15

C. The Eleventh Circuit Court Of Appeals' Practice Of Summarily Affirming Board Of Immigration Appeals Decisions Denying § 212(c) Relief In Cases Involving Controlled Substance Convictions Is Inconsistent With Decisions Of Other Circuit Courts Of Appeal 17

TABLE OF CONTENTS – Continued

Page

D. The Eleventh Circuit Court Of Appeals' Practice Of Issuing Only *Per Curiam* Affirmed Decisions, Without Any Meaningful Opinion Or Analysis, In Cases Where The Board Has Denied § 212(c) Relief To Qualified Lawful Permanent Residents With Controlled Substance Convictions, Is Improper As It Precludes Review Of Such Decisions 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Allen v. INS, 39 F.3d 326 (11th Cir. 1994) 21

American Ship Building Co. v. Nat'l Labor Relations Board, 380 U.S. 300, 85 S.Ct. 955 (1965) 16

Ashwas v. INS, 35 F.3d 577 (11th Cir. 1994) (unpublished) 12, 13

Diaz-Resendez v. INS, 965 F.2d 493 (5th Cir. 1992) 17, 18

Espinoza v. INS, 991 F.2d 1294 (7th Cir. 1993).....17, 18

Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587 (1930)..... 15

Francis v. INS, 532 F.2d 268 (2d Cir. 1976)..... 2

Gonzalez v. INS, 996 F.2d 804 (6th Cir. 1993).....11, 14

Leedom v. Kyne, 358 U.S. 204, 79 S.Ct. 180 (1958) 15

Lyng v. Payne, 476 U.S. 926, 106 S.Ct. 2333 (1986) 15

Matter of Buscemi, 19 I&N Dec. 628 (BIA 1988) 3

Matter of Edwards, Int. Dec. 3134 (BIA 1990)..... 4

Nieto v. INS, 979 F.2d 1539 (11th Cir. 1992) (unpublished) 12

NLRB v. Brown, 380 U.S. 290, 85 S.Ct. 980 (1965) 16

Rien Kouw v. INS, Case No. 93-4991 (11th Cir. Jul. 20, 1994) (unpublished).....12, 13

Simpson v. INS, Case No. 92-9294 (11th Cir. Nov. 24, 1993) (unpublished).....12, 13

Sowell v. Butcher and Singer, Inc., 926 F.2d 298 (3d Cir. 1991) 21

TABLE OF AUTHORITIES – Continued

Page

Tipu v. INS, 20 F.3d 580 (3d Cir. 1994) 17, 18, 19

United Gas Pipe Line Co. v. Memphis Light Gas and Water Division et al., 358 U.S. 103, 79 S.Ct. 194 (1958) 20

Vadino v. A. Valey Engineers, 903 F.2d 253 (3d Cir. 1990) 21

Vazquez-Castro v. INS, Case No. 94-4492 (11th Cir. Jan. 27, 1995) (unpublished) 12, 13

West Virginia University Hospitals, Inc. v. Casey, ___ U.S. ___, 111 S.Ct. 1138 (1991) 14

Yepes-Prado v. U.S. INS, 10 F.3d 1363 (9th Cir. 1993) 14, 17, 19

Zuniga-Pacheco v. INS, 40 F.3d 389 (11th Cir. 1994) (unpublished) 12

STATUTES

Immigration and Nationality Act, ("INA") § 212(c). . *passim*

8 U.S.C. § 1182(c) ..... *passim*

Immigration and Nationality Act, ("INA") § 101(a) ..... *passim*

8 U.S.C. § 1101(a)(43) ..... *passim*

OPINIONS BELOW

On February 7, 1995, the Eleventh Circuit Court of Appeals affirmed, *per curiam*, the decision of the Board of Immigration Appeals affirming the Immigration Judge's denial of Petitioner Thax Xavier Young's application for relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

Petitioner currently has pending before the Eleventh Circuit Court of Appeals a Petition for Rehearing and Suggestion for Rehearing *en banc*. The Petition was filed on March 24, 1995.

JURISDICTIONAL STATEMENT

This Petition seeks review of the February 7, 1995 order of the United States Court of Appeals for the Eleventh Circuit, affirming *per curiam*, and without a meaningful written opinion[1], a decision of the Board of Immigration Appeals in which the Board affirmed an Immigration Judge's denial of Petitioner's application for relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). This

[1] The order stated only: "PER CURIAM: Petitioner questions a denial of a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act. A review of the record convinces us that the Board of Immigration Appeals did not abuse its discretion and that there is substantial evidence which supports the decision. Affirmed." App. at 1.

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claim is based on 8 U.S.C. § 1182(c), INA § 212(c). ("INA § 212(c)," "§ 212(c)"). INA § 212(c) reads as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful, unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)).[2] Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

---

[2] Although on its face § 212(c) provides relief only to aliens INS seeks to exclude (as opposed to deport), and requires a departure from and a return to the United States, in fact, as a result of administrative and judicial interpretation, it now applies both to exclusion and deportation grounds and no actual departure from the United States is required. *See, Francis v. INS*, 532 F.2d 268, 270 (2d Cir. 1976).

Petitioner's claim is also related to 8 U.S.C. § 1101(a)(43), INA 101 § (a)(43), which reads in relevant part as follows:

> The term "aggravated felony" means . . . ,
>
> illicit trafficking in any controlled substance (as defined in section 802 of Title 21), including any drug trafficking crime (as defined in section 924(c) of Title 18);

STATEMENT OF FACTS AND OF THE CASE

A. Relief From Deportation Pursuant To § 212(c)

The Petitioner, Thax Xavier Young, is one of many lawful permanent residents who have sought review by the Eleventh Circuit Court of Appeals, of Board of Immigration Appeals' ("Board") decisions denying requests for § 212(c) relief from deportation. Mr. Young is eligible for such relief as he has lived in the United States for over 28 years as a lawful permanent resident[3]. App. at 2. Unless incarcerated for five years or more, individuals who are convicted of controlled substance related offenses, are eligible for § 212(c) relief. INA § § 101(a)(43); 212(c).

Individuals with such convictions are eligible for § 212(c) relief, but are required by Board case law to establish the existence of "unusual and outstanding equities" to merit a grant of such relief. *Matter of Buscemi*, 19

[3] Eligibility for § 212(c) relief requires a minimum of seven years lawful domicile in the United States. INA § 212(c).

I&N Dec. 628 (BIA 1988); *Matter of Edwards*, Int. Dec. 3134 (BIA 1990).

B. Facts Of Petitioner's Case

The record before the Eleventh Circuit Court of Appeals established that Mr. Young had the following unusual and outstanding equities supporting his application for § 212(c) relief:

1. Residency Of Long Duration In The United States.

Petitioner entered the United States as a lawful permanent resident in 1967 when he was 17 years old. (Ex. 1, A.R. 818-21)[4]. He has lived in the United States since that time.

2. Family Ties To The United States And Hardship To Petitioner And United States Citizen Family Members.

Virtually every member of Petitioner's immediate family is either a United States citizen or a lawful permanent resident. Mr. Young's wife is a United States citizen. His mother and father are U.S. citizens. (A.R. 390). All his siblings (except for one who lives in New Zealand) are U.S. citizens. (A.R. 201). Although Mr. Young is a native of Jamaica, none of his immediate relatives live in that

---

[4] The citations are to the official administrative record prepared by the Respondent for the Eleventh Circuit Court of Appeals.

country. His wife has no immediate relatives in Jamaica. (A.R. 387-88).

Mr. Young's mother and step-father live in the same Florida community as he does. Mr. Young takes care of his mother, who is a stroke victim, as well as his step-father, who has myeloma (bone cancer) and a heart condition. (A.R. 202, 216 Ex. 4R at 481-82). He is close to both his mother and his step-father and visits them regularly. (A.R. 207-09). If he were deported, neither his mother nor his step-father would be able to visit Mr. Young in Jamaica as they are too ill and frail to travel. (A.R. 210).

Mr. Young's mother-in-law, Daisy Aiken, lives with Mr. Young and his wife, Pansy. Mrs. Aiken is elderly; she suffers from heart disease, high blood-pressure, and arthritis. She cannot work. Mr. Young and his wife are her only means of financial support. (A.R. 182-83, 386).

3. Business Ties To The Community.

Mr. Young works in various aspects of the family business, Campbell's Foliage, Inc., which has expanded its business to include two properties where the nursery business is operated. (Ex. 4B, A.R. at 448-49). Mr. Young is well regarded in the local business community as "a hard working, honest and intelligent individual," (Ex. 4M, A.R. at 472-73, letter of Andrew Yap), who is "efficient in business transactions . . . helpful and fair . . . and an attribute to the company that he works for." (Ex. 4N, A.R. at 474-75 letter of Howard Ho Sang).

4. Petitioner's Employment and Hardship To United States Citizens and Lawful Permanent Residents.

Mr. Young works in a family owned nursery, Campbell's Foliage, in South Dade County, Florida. Mr. Young's wife, his brother-in-law, and his sister-in-law each have a one-third interest in Campbell's Foliage. (A.R. 183-84). The nursery employs approximately nine people, all of whom are either American citizens or lawful permanent residents. (A.R. 185-86). Unrebutted testimony at Mr. Young's deportation hearing confirmed that if Mr. Young were deported, the nursery would have to sell a portion of the land on which the business is located, and would have to fire at least three of its United States citizen employees. (A.R. 189-90). Further, the business would suffer if he were deported because his wife, a key employee, would follow her husband to Jamaica. (A.R. 190). The result would be that the business would have to close, not only displacing Mr. Young's family but also all the U.S. workers currently employed. (A.R. 189-90).

Without their salaries from the family business, neither Mrs. Young nor her husband could afford to support her mother or Mr. Young's mother and step-father. Neither Mr. Young nor his wife have any prospects for employment in Jamaica, a country with a high rate of unemployment. (A.R. 264-65, 356-57, 390).

5. Additional Hardship.

The Youngs, who are unable to have children, want to adopt a child, in particular an abused child or a child

who has been taken from his or her parents. (A.R. 389). However, Mrs. Young testified that she feels she would have to follow her husband to Jamaica if he were deported and could not raise children in Jamaica because of the poor economic and political situation there. (A.R. at 390).

6. Petitioner's Good Moral Character And Rehabilitation.

Mr. Young's father abandoned their family when Mr. Young was a child. (A.R. at 228). While growing up he lived with his grandmother and his aunt because his mother could not afford to take care of all her children. (A.R. 228). When he lived with his aunt he was required to work, even though he was still a child. (A.R. 229). He completed the sixth grade and taught himself to read as an adult. (A.R. 230). After he entered the United States he completed high school and took college credit classes in the United States. (A.R. 231).

Several years ago Mr. Young saved a man's life. While employed at a restaurant he prevented a customer from choking to death. No one else took any action except for Mr. Young, who physically intervened to prevent the customer from choking on his food. (A.R. 394). Mr. Young volunteers at Christ the King Catholic Church approximately four hours a week. He does general maintenance for the church and the school, at no charge. (A.R. 248). He also has worked for "Informed Families", an organization geared towards helping children grow up in a drug-free environment. (A.R. 249-51). He wrote the lyrics for and produced a tape against drugs for young

people sponsored by Informed Families. (A.R. 249-51, 4P).

Numerous character letters were submitted on Mr. Young's behalf attesting to his good moral character. (A.R. 664-80). His cousin, Earle Young, described how Thax helped him to deal with a personal marital crisis. After Earle Young's wife was disfigured in an automobile accident, the Petitioner counseled Earle Young's wife and helped her come to terms with the situation. (A.R. 462-63).

The uncontradicted testimony at the hearing was that Mr. Young was fully rehabilitated. Two professional counselors who are also corrections officers testified in person on Mr. Young's behalf at his deportation hearing. A third testified by letter on his behalf. All three testified that he was fully rehabilitated. (A.R. 146, 174, 143, Ex. 4 A; A.R. 446-47). One of these witnesses, Glenn Lincoln, a counselor and corrections officer for the Department of Corrections in Marathon, Florida, came to personally testify on Mr. Young's behalf even though he was required to make a 260 mile round trip by airplane that he had to pay for himself. (A.R. 77-79). Mr. Lincoln testified that Mr. Young did not have a criminal personality and was not a threat to society. (A.R. 74). Indeed, Mr. Lincoln thought so highly of Mr. Young that he told the court that he had given Mr. Young his home telephone number, even though Mr. Lincoln has a family. (A.R. 73). Mr. Lincoln stated that this was the first and only time he had ever given his home telephone number to any inmate at the institution. (A.R. 73).

Another correctional officer and counselor who knew Mr. Young, Edwin Sumpter, also testified on Mr. Young's behalf. Mr. Sumpter had individual counseling and group sessions with the Petitioner and observed him in specific rehabilitation programs. (A.R. at 46). He worked with Mr. Young for approximately seven months. (A.R. at 51). He testified that the Petitioner was "intelligent – hard working." (A.R. at 41). He described his record while incarcerated as "excellent" and stated that he had received an "outstanding" evaluation on a monthly basis. (A.R. at 41). He also rated Mr. Young as "outstanding" in relation to the hundreds of other persons who had been in his custody. (A.R. at 45) . Mr. Sumpter concluded his testimony by stating he believed that Mr. Young's past criminal conduct was a mistake, that he was not likely to commit such acts in the future, and that in his view he was fully rehabilitated. (A.R. at 46).

Harison Crenshaw, a vocational placement counselor, concluded that Mr. Young "conducted himself in a highly professional manner during his tour of the facility. His conduct was excellent and his overall demeanor was pleasant. He was one of the few men that has come to the facility that I found to be very open-minded, courteous, intelligent and responsible. I would like this letter to serve as an attestment (sic) of Mr. Young's character as viewed through observation." (A.R. at 143, Ex. 4 A, A.R. at 446-47). Thus, three corrections officers who had the opportunity to observe Mr. Young in detail came to the same conclusion – that he had been fully rehabilitated and did not have a criminal personality.

Further, Mr. Young's rehabilitation was also demonstrated by his community work, his consistent record of

employment with his family's business, and his unblemished record for the seven years since his conviction. Since his 1987 drug conviction, Mr. Young has had no further criminal involvement.

7. Administrative Proceedings And Appeal To The Eleventh Circuit Court Of Appeals.

In March, 1989, the Immigration and Naturalization Service filed an Order to Show Cause seeking to deport Mr. Young on the basis of two drug convictions.[5] (A.R. at 818-20). Following Mr. Young's deportation hearing, the Immigration Judge expressly found his case presented unusual and outstanding equities but denied Mr. Young's request for INA § 212(c) relief. (A.R. at 95). Mr. Young filed a timely appeal with the Board of Immigration Appeals on March 29, 1991. (A.R. at 81). On January 21, 1994, the Board of Immigration Appeals affirmed the Immigration Judge's decision, ordered Mr. Young deported, and denied his application for relief from deportation under INA § 212(c). (App. at 1).

The Petitioner filed a timely appeal with the Eleventh Circuit Court of Appeals. On review, Petitioner asserted

---

[5] The Order to Show Cause originally included a charge based on a marijuana possession arrest while he was in the U.S. Military in Germany in 1971. INS dropped the charge after proceedings commenced. (A.R. at 102). In 1970, while in the military, the Petitioner was involved in a fist fight at a German bar. He was convicted of assault in military court. (A.R. 211-12). The charge forming the basis for his deportability was a 1987 Florida state court conviction for conspiracy to traffic in marijuana. Mr. Young was incarcerated for less than five years, (A.R. at 113, 212), and thus qualifies for § 212(c) relief.

numerous errors in the Board's decision, including the Board's failure to consider many of the equitable factors stated above and its apparent policy of denying § 212(c) relief to lawful permanent residents who qualify for such relief, solely because they have a controlled substance conviction.

On February 7, 1995, a Panel of the Eleventh Circuit Court of Appeals affirmed the Board's decision *per curiam*, with a two sentence opinion, and without oral argument, which Petitioner had requested. App. at 1.

ARGUMENT

I. The Eleventh Circuit Court Of Appeals' *De Facto* Policy Of Summary Affirmance Of Board Decisions Denying § 212(c) Relief To Individuals With Controlled Substance Convictions Is Contrary To Statute, Is Inconsistent With Decisions Of This Court, And Is Inconsistent With Decisions Of Other Federal Appellate Courts.

In most, if not all, of the § 212(c) cases involving a controlled substance conviction which the Board of Immigration Appeals decides, it denies § 212(c) relief.[6]

---

[6] The Board does not compile or maintain statistics of grants and denials of § 212(c) relief with regard to cases involving controlled substance convictions. *Gonzalez v. INS*, 996 F.2d 804, 811 (6th Cir. 1993). However, at oral argument in *Gonzalez*, the INS attorney, when requested to provide the panel with decisions of the Board exercising § 212(c) jurisdiction in favor of an alien, was able to provide that court with only one such decision out of 3,000 published Board decisions. *Gonzalez, supra* at 810.

Petitioner has been unable to locate any case in which the Eleventh Circuit Court of Appeals has reversed the Board of Immigration Appeals when the Board has denied on *de novo* review (or by affirming an Immigration Judge's denial) a § 212(c) application for relief from deportation where the individual seeking such relief was deportable due to a controlled substance conviction. Indeed, the Eleventh Circuit Court of Appeals routinely and uniformly affirms the Board's decisions in § 212(c) cases involving such convictions, usually without any comment other than to state that the Board did not abuse its discretion. *See, e.g., Vazquez-Castro v. INS*, Case No. 94-4492 (11th Cir. Jan. 27, 1995) (unpublished); *Simpson v. INS*, Case No. 92-9294 (11th Cir. Nov. 24, 1993) (unpublished); *Ashwas v. INS*, 35 F.3d 577 (11th Cir. 1994) (unpublished); *Rien Kouw v. INS*, Case No. 93-4991 (11th Cir. Jul. 20, 1994) (unpublished); *Zuniga-Pacheco v. INS*, 40 F.3d 389 (11th Cir. 1994) (unpublished); *Nieto v. INS*, 979 F.2d 1539 (11th Cir. 1992) (unpublished).

In the Petitioner's case, the Immigration Judge explicitly found that Mr. Young had established the required unusual and outstanding equities. (A.R. at 95). The Board did not discuss or question that finding. The equities in Mr. Young's case were his residency of long duration in the United States, his record of consistent and stable employment, his strong family ties to the United States, and the hardship that his U.S. citizen and lawful permanent relatives would suffer if he were deported. Thus, this case presented a classic scenario for a grant of § 212(c) relief. Despite this, the appellate court, *per curiam* affirmed, without any analysis or comment on the Board's clearly erroneous decision.

The Eleventh Circuit's affirmance of the Board in this case is but one in a long line of *per curiam* affirmances by

the Court of Board decisions denying § 212(c) relief to aliens in cases analogous to Mr. Young's. Many of these cases involve individuals like the Petitioner who have immigrated to this country, are here legally and have been in this country for many years, but who have been ordered deported because of a conviction for a single, isolated controlled substance offense. See, e.g., *Rien Kouw v. INS*, Case No. 93-4991 (11th Cir. July 20, 1994) (unpublished); *Simpson v. INS*, Case No. 92-9294 (11th Cir. Nov. 24, 1993) (unpublished); *Ashwas v. INS*, 35 F.3d 577 (11th Cir. 1994); *Vazquez-Castro v. INS*, Case No. 94-4492 (11th Cir. Jan. 27, 1995) (unpublished).

A. The Eleventh Circuit Court Of Appeals' Practice Of Summarily Affirming Board Of Immigration Appeals Denials Of § 212(c) Relief In Cases Involving Controlled Substance Convictions Is Contrary To Federal Law And Congressional Policy.

Neither the express language of § 212(c), nor decisions construing the statute, bar an individual who has been convicted of a narcotics related offense from receiving INA § 212(c) relief. Indeed, Congress has recently reaffirmed its intent that persons convicted of controlled substance offenses are eligible for INA § 212(c) relief as long as they have served less than five years in prison for their offense. Pursuant to 8 U.S.C. § 1101(a)(43) and § 1182(c) persons who have been convicted of a controlled substance offense are precluded from obtaining INA § 212(c) relief only if they have been incarcerated for five years or more for controlled substance offenses.

The Board's apparent policy of categorically denying § 212(c) relief in such cases has been noted with disapproval by at least two federal courts of appeal. *Yepes-Prado v. U.S. INS*, 10 F.3d 1363 (9th Cir. 1993); *Gonzalez v. INS*, 996 F.2d 804 (6th Cir. 1993). As the *Yepes-Prado* court stated: An unwritten policy of denying § 212(c) relief in cases involving controlled substance convictions is "an impermissible contravention of Congressional policy . . . inconsistent with the Attorney General's duty to evaluate § 212(c) applications on a case by case basis." *Yepes-Prado, supra*, at 1371. ["[Board] may not categorically deny 212(c) relief to drug offenders who have served less than five years incarceration"]; *See, also, Gonzalez v. INS, supra*, at 810 [. . . the Board's lack of exercise of discretion [in 212(c) controlled substance cases] leaves the impression that it has a policy of not granting a § 212(c) waiver in a case where an alien has been convicted of a serious drug offense. Such a policy, if it does exist, . . . [is] an unauthorized assumption by the INS of a position properly to be made by Congress."].

The Eleventh Circuit Court of Appeals, no less than the Board, is bound by the Immigration and Nationality Act and by Congressional policy. Thus, when it reviews Board decisions, the Court is bound to apply the laws enacted by Congress. *See, West Virginia University Hospitals Inc. v. Casey*, ___ U.S. ___, 111 S.Ct. 1138, 1147 (1991) ["[w]here . . . the statute's language is plain 'the sole function of the court is to enforce it according to its terms' "]. The Eleventh Circuit's uniform and categorical affirmance of Board decisions denying § 212(c) relief to qualified lawful permanent residents constitutes tacit

approval of the Board's illegal policy of denying § 212(c) relief to qualified individuals in virtually all cases involving controlled substance convictions.

B. The Eleventh Circuit Court Of Appeals' Policy Of Uniformly Affirming All Board Decisions Denying § 212(c) Relief To Lawful Permanent Residents With Controlled Substance Convictions Conflicts With Or Is Inconsistent With Decisions Of This Court.

This Court has previously held that an administrative agency's powers cannot properly be extended or created by a court. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 51 S.Ct. 587 (1930); *See, Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333 (1986) [agency's power is no greater than that delegated to it by Congress]; *Leedom v. Kyne*, 358 U.S. 204, 79 S.Ct. 180 (1958) [Supreme Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated power]. The Board's apparent policy of denying § 212(c) relief in virtually all cases in which a qualified lawful permanent resident has a controlled substance conviction is directly contrary to § 212(c) of the Immigration and Nationality Act. The Board's policy is an abuse of its Congressionally delegated power because Congress has expressed its intention that such relief is available to individuals with controlled substance convictions who have been incarcerated less than five years. INA § 212(c). The Eleventh Circuit Court of Appeals' consistent affirmance of Board decisions denying § 212(c) relief in cases such as Petitioner's constitutes acquiescence to the Board's illegal policy. The lower court's

practice is in effect an improper attempt to create and expand the scope of the Board's authority.

By rubber stamping the Board's decisions, and hence by tacitly approving the Board's *de facto* policy of denying § 212(c) relief in cases involving controlled substance convictions, the lower court has abdicated its responsibility to apply the law in reviewing decisions of administrative agencies, such as the Board. As this Court has previously stated, "while courts should be slow to overturn an administrative decision, *they are not left 'to sheer acceptance' of [an agency's] conclusions.*" *NLRB v. Brown*, 380 U.S. 290, 298, 85 S.Ct. 980, 988 (1965) (citations omitted). Thus, as this Court stated in *Brown, supra*, "reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute. Such review is always properly within the judicial province, and *courts abdicate their responsibility if they do not fully review such administrative decisions.*" *Brown, supra*, at 291-92 (emphasis added). Thus, "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. Nat'l Labor Relations Board*, 380 U.S. 300, 317, 85 S.Ct. 955, 967 (1965).

Congress has made a policy decision that individuals such as Mr. Young are eligible for § 212(c) relief. By giving undue deference to Board decisions which virtually always deny INA § 212(c) relief to lawful permanent residents who have been incarcerated for less than

five years for controlled substance convictions, the Eleventh Circuit Court of Appeals has allowed the Board to implement its own unauthorized policy of categorically denying such relief to qualified individuals, contrary to statute and Congressional policy.

C. The Eleventh Circuit Court Of Appeals' Practice Of Summarily Affirming Board Of Immigration Appeals Decisions Denying § 212(c) Relief In Cases Involving Controlled Substance Convictions Is Inconsistent With Decisions Of Other Circuit Courts of Appeal.

The Eleventh Circuit Court of Appeals' practice of categorically affirming Board decisions denying § 212(c) relief to qualified applicants with controlled substance convictions is contrary to that of other federal appellate courts. Federal courts of appeals in other circuits have reversed the Board numerous times in § 212(c) cases involving controlled substance convictions. *See, e.g., Diaz-Resendez v. INS*, 965 F.2d 493 (5th Cir. 1992); *Yepes-Prado v. U.S. INS*, 10 F.3d 1363 (9th Cir. 1993); *Tipu v. INS*, 20 F.3d 580 (3d Cir. 1994); *Espinoza v. INS*, 991 F.2d 1294 (7th Cir. 1993).

For example, the Fifth Circuit in *Diaz-Resendez*, 965 F.2d 493 (5th Cir. 1992) reversed and remanded a § 212(c) controlled substance case to the Board. In *Diaz-Resendez*, the petitioner was deportable because of a conviction for possession with intent to distribute 21 lbs. of marijuana. *Diaz-Resendez, supra*, at 494. The immigration judge denied the application for § 212(c) relief and the Board affirmed the immigration judge's decision. In a detailed decision, the Fifth Circuit found that the Board had failed

to consider all of the relevant factors supporting the application for § 212(c) relief, had improperly weighed the equities in support of Diaz-Resendez' case, and had otherwise erred in its review of the immigration judge's decision. *Diaz-Resendez, supra,* at 495-98. The *Diaz-Resendez* court vacated and remanded the decision to the Board. *Diaz-Resendez, supra,* at 494.

Similarly, the Seventh Circuit Court of Appeals in *Espinoza v. INS*, 991 F.2d 1294 (7th Cir. 1993) also vacated and remanded to the Board a § 212(c) case involving a controlled substance conviction. In *Espinoza*, the petitioner was convicted of delivery of cocaine on five separate occasions in 1987 and 1988, and possession of cocaine on two other occasions in 1987 and 1988. *Espinoza, supra,* at 1295. In *Espinoza*, the immigration judge concluded that Espinoza had established sufficient unusual and outstanding equities to offset his crime and granted him a § 212(c) waiver from deportation. *Espinoza, supra,* at 1298. However, on appeal by the INS, the Board reversed the Immigration Judge. Espinoza appealed to the Seventh Circuit Court of Appeals. The Court found that the Board abused its discretion refusing Espinoza a waiver of deportation and vacated and remanded the case. *Espinoza, supra,* at 1305.

In *Tipu v. INS*, 20 F.3d 580 (3d Cir. 1994) the court vacated and remanded to the Board a § 212(c) deportation case where the petitioner had been convicted of conspiracy to distribute heroin. *Tipu, supra,* at 580, 582. The Third Circuit vacated and remanded the case to the Board because it found that the Board's opinion failed to adequately explain its discrediting of various factors in Tipu's favor, including the hardship deportation would

impose on his family, the circumstances surrounding the crime, and his rehabilitation, and his property and business ties to the United States in the form of his ownership of a taxi cab. *Tipu, supra,* at 582-87.

Finally, in *Yepes-Prado v. U.S. INS,* 10 F.3d 1363 (9th Cir. 1993) the appellate court also vacated and remanded a Board decision involving a request for § 212(c) relief by a lawful permanent resident who had been convicted of a controlled substance offense. The individual in that case had been arrested and convicted for possession of heroin with intent to distribute in violation of California law. *Yepes-Prado, supra,* at 1365. The *Yepes-Prado* court vacated and remanded the case to the Board because the Board improperly affirmed the immigration judge's decision which failed to evaluate the circumstances surrounding Yepes-Prado's drug conviction properly, and lacked a reasonable explanation of why that conviction outweighed all the equities in his favor. *Yepes-Prado, supra,* at 1372. The court also found that the Board's decision was reversible as it improperly evaluated the evidence of rehabilitation in that case. *Yepes-Prado, supra,* at 1372.

In contrast, the Eleventh Circuit Court of Appeals has, to Petitioner's knowledge, never reversed the Board in a § 212(c) controlled substance case.

D. The Eleventh Circuit Court Of Appeals' Practice Of Issuing Only *Per Curiam* Affirmed Decisions, Without Any Meaningful Opinion Or Analysis, In Cases Where The Board Has Denied § 212(c) Relief To Qualified Lawful Permanent Residents With Controlled Substance Convictions, Is Improper As It Precludes Review Of Such Decisions.

The Eleventh Circuit Court of Appeals' consistent practice of affirming Board decisions denying § 212(c) relief to qualified lawful permanent residents with controlled substance convictions by *per curiam* affirmance, and without any written decision or opinion (other than a conclusory statement in some cases that the Board did not abuse its discretion) shields from review its policy of approval of the Board's illegal policy. This practice frustrates proper administration of the Immigration and Nationality Act – a law which indisputably provides that lawful permanent residents such as Petitioner are eligible for § 212(c) relief. INA § 212(c); INA § 101(a)(43).

This Court has previously granted certiorari to review judgements of United States courts of appeal because of actions or omissions which "seriously frustrated the administration" of federal laws. *See, e.g., United Gas Pipe Line Co. v. Memphis Light Gas and Water Division et al.*, 358 U.S. 103, 79 S.Ct. 194 (1958) [Court granted Certiorari to review judgment of United States Court of Appeals because of claim that court of appeals had misinterpreted a prior decision of the Supreme Court and suggestion that court of appeals judgement seriously frustrated proper administration of Natural Gas Act].

The Eleventh Circuit Court of Appeals' practice, in virtually all cases[7], of affirming *per curiam* and without meaningful explanation, the Board's consistent denial of § 212(c) relief to qualified individuals with controlled substance convictions improperly precludes this Court from reviewing those cases, as well as what appears to be the lower court's practice of acquiescing to the Board's illegal policy of denying § 212(c) relief in such cases. *See, Vadino v. A. Valey Engineers*, 903 F.2d 253 (3d Cir. 1990) [court of appeals exercised its inherent supervisory power to require district courts to provide explanation for orders granting summary judgement, in order to assist court of appeals in carrying out its statutory function of appellate review]; *Sowell v. Butcher and Singer, Inc.*, 926 F.2d 298 (3d Cir. 1991) [in the interest of parties' ability to present relevant appellate argument, conservation of judicial resources, and effective appellate review, court of appeals exercised its supervisory power to require that each district court in the circuit entering directed verdict in cases before it set forth explanation sufficient to permit court of appeals to understand legal premise for court's order.]

---

[7] Petitioner was able to find only one case in the past three years where the Eleventh Circuit has entered a written decision providing any substantive explanation for its affirmance of a Board of Immigration Appeals 212(c) decision denying such relief on the merits to an alien with a controlled substance conviction. *Allen v. INS*, 39 F.3d 326 (11th Cir. 1994).

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that the writ be granted.

Respectfully submitted,

IRA J. KURZBAN
KURZBAN KURZBAN WEINGER
AND TETZELI, P.A.
2650 S.W. 27th Avenue, 2nd Floor
Miami, FL 33133
Tel: (305) 444-0060

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4152
Non-Argument Calendar

INS No. A17 538 999

THAX XAVIER YOUNG,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

(February 7, 1995)

Before TJOFLAT, Chief Judge, HATCHETT, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

Petitioner questions a denial of a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act. A review of the record convinces us that the Board of Immigration Appeals did not abuse its discretion and that there is substantial evidence which supports the decision.

Affirmed.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A17 538 999 – Miami Date: JAN 21 1994

In re: THAX XAVIER YOUNG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Ira J. Kurzban, Esquire
Kurzban, Kurzban, and Weinger
2650 S.W. 27th Avenue, 2nd Floor
Miami, Florida 33133

ON BEHALF OF SERVICE: Michael Harper
Acting Appellate Counsel

ORAL ARGUMENT: December 5, 1991

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] – Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

This is an appeal from the decision of an immigration judge dated March 22, 1991, finding the respondent deportable as charged, denying his application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordering him deported from the United States to Jamaica. The respondent's appeal will be dismissed.

The respondent is a 42-year-old male, a native and citizen of Jamaica. The respondent entered the United States at New York City, New York, on October 4, 1967, as an immigrant. An Order to Show Cause alleges that on March 19, 1971, the respondent was convicted by a General Court-Martial, assembled in Wurzburg, Germany, Headquarters, 3rd Infantry Division, United States Army, of possession of marijuana in violation of the Uniform Code of Military Justice, Article 134. The Order to Show Cause further alleges that on October 28, 1987, the respondent was convicted in the Circuit Court, in and for Broward County, Florida, of Conspiracy to Traffic In Cannabis in violation of Florida Statute 893.135(4).

The respondent is charged with deportability pursuant to section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11). During the hearing held on July 13, 1989, the respondent, through counsel, admitted that the respondent entered the United States at New York City on October 4, 1967, and that he was admitted as a lawful permanent resident alien. The respondent denied the truth of the remainder of the allegations contained in the Order to Show Cause and denied deportability. The Immigration and Naturalization Service then withdrew the allegation alleging that the respondent had been convicted by a General Court-Martial on March 19, 1971, and the proceeding was continued.

When the deportation proceeding resumed on September 13, 1989, the Service introduced a certified copy of an Immigrant Visa and Alien Registration (Form FS-511) with a name identical to the respondent's name (Exhibit 2). The respondent objected to the introduction of Exhibit

2, but the immigration judge overruled the objection and admitted the exhibit into evidence.[1] During the hearing the respondent identified his name and admitted that he was born in Jamaica and is a citizen of that country (Tr. at 12). The immigration judge therefore found that the Service had established the respondent's alienage and the respondent does not contest that determination on appeal.

The Immigration and Naturalization Service introduced a certified copy of a record of conviction from the Circuit Court, in and for Broward County, Florida, for Conspiracy to Traffic In Cannabis (Exhibit 3). The respondent objected to the introduction of Exhibit 3 into evidence, but the immigration judge overruled the objection and admitted the conviction into evidence. The immigration judge found the respondent deportable as charged.

On appeal the respondent contends that the Service did not establish his deportability by clear, unequivocal, and convincing evidence. The respondent contends that the record of conviction did not contain a certification in accordance with Rule 44 of the Federal Rules of Civil Procedure, or 8 C.F.R. § 287.6.

Immigration proceedings are not bound by the strict rules of evidence. *See, e.g., Bauge v. INS*, 7 F.3d 1540 (10th Cir. 1993); *Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990); *Baliza v. INS*, 709 F.2d 1231 (9th Cir. 1983); *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1981); *Longoria-Castaneda v.*

---

[1] A district director has authorization under 8 C.F.R. § 103.7(d)(2) to certify copies of files, documents, and records in the custody of his office.

INS, 548 F.2d 233 (8th Cir.), *cert. denied*, 434 U.S. 853 (1977) (rules of evidence do not apply except to the extent that due process is involved); *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978). In order to be admissible, evidence generally need only be shown to be probative and its use fundamentally fair, so as not to deprive the alien of due process of law. *See, e.g., Baliza v. INS, supra; Tashnizi v. INS, supra; Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

Certain documentary evidence, however, is required by the regulations to be certified. Section 287.6(a) of the regulations states that when domestic public or official records are admitted for any purpose, they "shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy." 8 C.F.R. § 287.6(a).

In the case at hand the conviction was certified by the clerk of the court. We note that while the respondent objected to the admission of Exhibit 3 into evidence, he offered no evidence to even suggest that the conviction record did not relate to him, or that the record was erroneous. The respondent's objection during the hearing and on appeal to Exhibit 3 appears to be merely perfunctory in nature. The respondent has failed to show that the introduction of the conviction record was improper. We find that deportability has been established by clear, unequivocal, and convincing evidence as required by *Woodby v. INS*, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a). We turn now to the facts of the respondent's

case concerning his application for a waiver of inadmissibility.

The respondent was born and raised in Jamaica. The respondent testified that his life in Jamaica was difficult. When he was seven years of age his parents separated. The respondent's father left and he was sent to live with his grandmother until he was ten years of age. The respondent then resided with an aunt until he left Jamaica (Tr. at 125-129). The respondent worked for his aunt at an ice cream parlor she owned and later at a restaurant. The respondent only attended school through the sixth grade and he taught himself to read.

The respondent left Jamaica when he was 17 years of age, entered the United States in 1967 and resided in Connecticut. The respondent completed high school and took a course at a junior college learning about air conditioning and refrigeration. The respondent worked at a food store and on January 3, 1968, he enlisted in the United States Army (Tr. at 131).

The respondent received his basic training at Fort Dix, New Jersey, and then he was assigned to the 7th Cavalry in Germany. The respondent pled guilty at a general court-martial for possession of marijuana, being absent without leave, and assault with a dangerous weapon (Tr. at 209-210). The respondent and two other servicemen drove to Frankfurt to purchase five kilos of marijuana for a number of other service members (Tr. at 202-203). After the respondent and his confederates had purchased the marijuana a chase ensued involving the German police and they were eventually apprehended (Tr. at 207). The respondent served two years in the

stockade and was dishonorably discharged from the Army as a result of his general court-martial conviction (Tr. at 219-220, 236-237, Exhibit 5).

Prior to his court-martial conviction the respondent was convicted of assault in a German civil court and he served about eight or nine months confinement in a German jail. The respondent indicated that he had been involved in a fist fight (Tr. at 210-212; 253).

During the respondent's confinement he completed his degree in air conditioning, refrigeration and basic electronics. Upon the respondent's release from confinement he obtained employment with a company running a packing machine and driving a delivery truck. In the winter of 1973 the respondent obtained employment with a refrigeration company. The respondent started as an apprentice, became a mechanic and worked there for about 6 years. The respondent left that position to start his own air conditioning and refrigeration business. The respondent was not able to profitably operate the business and he worked with a restaurant servicing the refrigeration equipment.

The respondent married in 1977 and he and his wife were living in New York City with his mother-in-law (Tr. at 142). In 1985 the respondent was charged with conspiracy to traffic in marijuana. The respondent explained that his mother-in-law was laid off from her job and the respondent and his wife were experiencing financial difficulties.

Sometime in 1985 an acquaintance named Joe Hue told the respondent that another individual named Howard Lubarsky needed someone to travel to Florida. At the

time the respondent was employed at the Step In Restaurant (Tr. at 175). The respondent then met with Mr. Lubarsky for lunch and was informed that he wanted the respondent to travel to Florida with him to meet someone and discuss the purchase of marijuana. The respondent was to be paid $5000 for his services (Tr. at 179). The respondent, Lubarsky, and another individual made two trips to Florida in April and May of 1985 to negotiate the dug [sic] transaction (Tr. at 180). In fact the respondent was designated to meet with the drug seller. On the first trip the respondent did meet the seller and discussed the purchase of 200 pounds of marijuana for $340 per pound (Tr. at 185-188). During the second trip the respondent met with the seller and agreed to purchase 600 pounds of marijuana. Mr. Lubarsky gave the respondent $120,000 in a bag. The respondent showed the seller the money and he viewed the contraband. However, there was a dispute over the quality of the marijuana and the transaction was not completed. The respondent and the others were leaving the scene when they were arrested by the police (Tr. at 196).

The respondent was sentenced to 3 1/2 years confinement in October 1987. He testified that he was released from prison in March 1989 (Tr. at 148). Mr. Kevin R. Sumter, a corrections officer at a work release facility where the respondent was incarcerated in 1988 served as the respondent's correctional officer and counselor. He testified that the respondent worked in the mechanics shop and had an excellent record at the facility. Mr. Sumter believed that the respondent was rehabilitated. Mr. Glen A. Lincoln, a counselor who had worked at the

South Florida Reception Center, testified that he supervised the respondent in the latter part of 1987, trusted him and believed that he was rehabilitated.

The respondent's wife is a United States citizen and she testified that if the respondent is deported she would accompany him to Jamaica. Mrs. Young indicated that she has difficulty bearing children and has a physical problem which could heighten her medical problems if she became pregnant. She would, therefore, not have children if the respondent is deported to Jamaica.

The respondent's mother and stepfather are elderly, in ill health and are close emotionally and financially dependent upon him. The respondent's mother has suffered a stroke and his stepfather suffers from cancer and other serious diseases. The respondent also has a close relationship with his mother-in-law Daisy Ahkin [sic], who he has lived with for 13 years since his marriage. Mrs. Aiken also suffers from serious diseases.

The respondent and his wife work at Campbell's Foliage, Inc., a nursery. The business is owned by his brother, his sister-in-law and his wife. The respondent's brother-in-law, his sister, a day care director and a friend also testified on the respondent's behalf.

The immigration judge found that since the respondent was convicted of a serious criminal offense involving the trafficking of a controlled substance he had to show outstanding equities. The immigration judge found that the respondent's residence in the United States and his close family ties were outstanding equities. The respondent arrived in the United States when he was 17 years of age and with the exception of his military service

in Germany, he has sent all of his adult life in the United States. The respondent has significant family ties in the United States. His wife, mother, stepfather, mother-in-law, and all of his siblings, with the exception of one sister, live in the United States and are United States citizens or lawful permanent residents. The immigration judge noted that the respondent's family would face some emotional and financial hardship if the respondent is deported. However, the immigration judge also noted that the respondent was aware of his parents' illness when he involved himself in criminal activity in 1985.

The immigration judge found that the outstanding equities in the respondent's favor did not outweigh the adverse factors against granting the respondent a waiver of inadmissibility. The respondent was convicted of conspiracy to traffic 600 pounds of marijuana. This is a serious conviction involving a substantial amount of illegal drugs. The immigration judge noted, moreover, that the respondent had previously been involved in illegal drug activity when he was in the United States Army. The respondent admitted that while in the army he was a regular user of marijuana and one incident led to his court-martial from the army with a dishonorable discharge. The respondent also served two years at hard labor for his court-martial conviction and eight or nine months for another conviction in Germany. The respondent, however, did not appear to learn from his prior criminal activity. The immigration judge also found that the respondent played a major role in the criminal activity that led to his conviction in 1987 for conspiracy to Traffic In Cannabis.

On appeal the respondent contends that the immigration judge failed to consider numerous favorable factors in his behalf; that the immigration judge erred in his view of the financial condition of the respondent and his family if he is deported; that the immigration judge misunderstood the degree of the respondent's culpability leading to his criminal conviction; and that the immigration judge failed to consider the unrebutted testimony as to his complete rehabilitation.

In support of these contentions the respondent points to his difficult childhood in Jamaica and his family ties in the United States. The respondent asserts that he has close family ties in the United States and no family ties in Jamaica. The respondent is close to his parents and mother-in-law who depend upon him for emotional and financial support. The respondent is also close with his brother-in-law, Patrick Campbell, a lawful permanent resident, and Mr. Campbell's children. The respondent is also close to other members of his family. In addition, the respondent points out that he has resided in the United States for over 24 years. The respondent contends that if he is deported his family will experience hardship. The respondent also argues that his deportation would adversely affect the family business and at least part of the nursery would probably close and at least three United States citizens would lose employment. The respondent and his wife would also be adversely affected. The respondent's wife would not have children and he and his wife would encounter great difficulty finding employment in Jamaica. The respondent also points out that he has an extensive history of employment, has business ties and has served the community. The respondent further

contends that he has established his rehabilitation. The respondent also points out that his wife testified that while the respondent was working in a restaurant in New York a customer began choking on his food and he went up behind the man and was able to dislodge the food thus saving the man's life.

Section 212(c) of the Act provides, in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds of exclusion. In light of our decision in *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), a lawful permanent resident is prima facie eligible for relief from deportation under section 212(c), even though he has not proceeded abroad subsequent to the acts which rendered him deportable. *See Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

Section 212(c) of the Act, however, does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or her delegate is required to determine as a matter of discretion whether an alien merits the relief sought, and the alien bears the burden of demonstrating that his application warrants favorable consideration. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the social and humane considerations presented in an alien's favor

against the adverse factors evidencing his undesirability as a permanent resident. The Board has enunciated numerous factors to be considered in determining whether or not to grant section 212(c) relief. *See id.* Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *Id.*

As regards rehabilitation, we note that a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in every section 212(c) application involving an alien with a criminal record. *See Matter of Edwards,* Interim Decision 3134 (BIA 1990). Section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Matter of Roberts,* Interim Decision 3148 (BIA 1991); *Matter of Edwards, supra.* While an alien may be unable to establish convincingly that he has been rehabilitated due to his recent and lengthy incarceration, the short length of time since his conviction, or the fact that he is still on probation, his positive efforts toward rehabilitation may be considered, and he is not barred automatically from discretionary relief.

Among the factors deemed adverse to an alien are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id.* Moreover, as we noted in *Marin*, one or more of these adverse considerations may ultimately be determinative of whether section 212(c) relief is in fact granted in an individual case. *Id.*

We have also pointed out that as the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. *Marin* at 585. Such a heightened showing is required when an alien has been convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs. *Id.* at 586 n.4. The necessity of demonstrating unusual or outstanding equities is not exclusively triggered by serious crimes involving controlled substances, however. Rather, as we indicated in *Marin*, one must examine the gravity of the offense, *per se*. *Id.* In addition, such a showing may be mandated because of a single serious crime, as in *Marin*, or because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). We also have noted that an alien who demonstrates unusual or outstanding equities, as required, does not compel a favorable exercise of discretion; rather, absent such equities, relief will not be

granted in the exercise of discretion. *Matter of Buscemi, supra; see also Matter of Marin, supra.* There are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the face of unusual or outstanding equities. Such was the situation in *Matter of Buscemi, supra.*

The respondent's contention that the immigration judge failed to discuss and consider all the equities presented in his favor is without merit. We do not find that such was the case. The immigration judge did consider the positive factors on the respondent's behalf. However, the burden of persuasion is on the respondent. The immigration judge need not list every favorable equity on the respondent's behalf. The respondent has to show that the outcome would be different if the immigration judge failed to consider a positive equity. The respondent has failed to show that the immigration judge did not consider an important equity in his favor or that the immigration judge distorted the evidence. Moreover, in regard to the question whether relief is warranted as a matter of discretion, we note that we have reviewed the record on a de novo basis. Consequently, the respondent has not been prejudiced by any alleged error on the part of the immigration judge in failing to properly consider the factors in his case. *See Matter of Edwards, supra.*

This respondent's statutory eligibility for relief under section 212(c) has been established. The issue, therefore, is whether the respondent should be granted a waiver of inadmissibility in the exercise of discretion. In regard to the exercise of discretion, we initially note that we consider the respondent's conviction for Conspiracy to Traffic in Cannabis to be a serious adverse factor militating

against the granting of his application for a waiver of inadmissibility. Moreover, the respondent was involved in prior criminal drug activity when he was in the army yet he again became involved in drug activity in 1985.

Therefore, due to the respondent's past criminal drug activities and his 1987 conviction, absent a showing of unusual or outstanding equities, we would not favorably exercise our discretion in this case. *See Matter of Buscemi, supra; Matter of Marin, supra.*

We agree with the immigration judge that the respondent's family ties are an outstanding equity in his behalf. The respondent is married and has an extensive employment record. The respondent has many close family relationships with his wife, his parents, and his mother-in-law. The respondent's parents and mother-in-law are in poor health and depend upon him. The respondent's long period of permanent residence in the United States could be another outstanding equity. The respondent came to the United States as an immigrant in 1967 when he was 17 years of age and he has been a permanent resident since that time. However, we note that this favorable equity is somewhat diminished by the fact that the respondent has spent a number of years in various penal institutions in the United States Army, in Germany and in the United States.

It is submitted both below and on appeal that the respondent has presented significant evidence of rehabilitation and that this is a meaningful equity to be considered in the exercise of discretion. The respondent did present evidence on this point. A corrections officer at a work release facility and a counselor at the South Florida

Reception Center testified that the respondent was trustworthy and responsible. The respondent's wife and other friends and family members also testified that the respondent is a loving and honorable person. However, this positive evidence is undermined by the fact that the respondent had close family ties before he became involved in the illegal drug conspiracy which led to his 1987 conviction.

In this regard, however, we must consider the facts surrounding the respondent's 1987 conviction. As noted previously, the respondent was involved in a conspiracy to purchase 600 pounds of marijuana. The respondent attempted to minimize his participation in the conspiracy; however, the facts reveal that he took a major role in the conspiracy. The respondent made two trips to Florida for the express purpose of purchasing large amounts of marijuana. On the first trip the respondent met the seller and discussed the purchase of 200 pounds of marijuana for $340 per pound. The respondent again returned on a second occasion and agreed to purchase 600 pounds of marijuana and he gave the seller $120,000 in a bag.

The respondent's claim of rehabilitation is further undermined by the fact that he was involved in drug activity and violent conduct while he served in the army in Germany. The respondent and two other confederates drove to Frankfort to purchase five kilos of marijuana so that he could distribute the marijuana to his fellow service members. The respondent served two years in the stockade and was dishonorably discharged from the army. Prior to the court-martial the respondent had served about eight or nine months in a German jail. This respondent returned from Germany to the United States

after spending a substantial part of his military career in prison. The respondent's criminal behavior in the army can only be characterized as reprehensible. The respondent, however, was given a second chance to remain in the United States since he was not placed in deportation proceedings upon his return – yet he again engaged in the illegal trafficking of marijuana in 1985. Therefore the "evidence" of rehabilitation is simply not such that we would give it any significant weight in the discretionary balancing in this case.

During oral argument counsel emphasized the hardship that will result to the respondent, his wife and family, and the family nursery business. We point out that evidence of hardship to the respondent and his family if deportation occurs is only one factor to consider in the exercise of discretion pursuant to section 212(c) relief. Evidence of hardship is not a major statutory factor in section 212(c) relief as clearly the element of extreme hardship is in suspension of deportation pursuant to section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1). *See, e.g., INS v. Wang,* 450 U.S. 139 (1981) (The Supreme Court noted the "exceptional nature of the suspension remedy" and upheld a narrow interpretation of the extreme hardship requirement as consistent with the statutory language).

In conclusion, we find that the positive equities on the respondent's behalf which include his close family ties, the hardship to the respondent and his family if he is deported to Jamaica and his long residence in the United States as a permanent resident are outweighed by the respondent's substantial participation in a conspiracy to purchase 600 pounds of marijuana and his resulting 1987

conviction for Conspiracy to Traffic in Cannabis. When we consider all of the evidence that the respondent presented regarding his equities, we simply do not find that he has demonstrated that these equities outweigh the adverse matters in this case and that he merits a favorable exercise of discretion. Accordingly, his appeal from the immigration judge's denial of relief under section 212(c) will be dismissed.

ORDER: The appeal is dismissed.

/s/ Fred W. Vacco
FOR THE BOARD